University of Pennsylvania
Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 116 FEBRUARY 1968 No. 4

BLIND MAN'S BUFF † AND THE *NOW*-PROBLEMS OF APOCRYPHA, INC. AND LOCAL 711—DISCOVERY PROCEDURES IN COLLECTIVE BARGAINING DISPUTES

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In labor-management relations justice delayed is often justice denied. A remedy granted more than two years after the event will bear little relation to the human situation which gave rise to the need for Government intervention.†††

† "By preventing the Union from conducting these studies, the Company was, in essence, requiring it to play a game of blind man's bluff." Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 721 (1966). Aficionados of the game do bluff the blindman but he is subjected to buffs, which is why the game is properly referred to as "blind-man's buff." *See* WEBSTER'S INTERNATIONAL DICTIONARY 234 (3d ed. P. Gove ed. 1966).

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* *Caveat au Douglas*

In June 1965, Mr. Justice Douglas commented on the problem of non-disclosure of special pleader status among those who contribute to law reviews. He deplored the failure of the reviews to disclose in the first footnote that "the views presented are those of special pleaders who fail to disclose that they are not scholars but rather people with axes to grind. The reader should know through what spectacles his adviser is viewing the problem." Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228-30 (1965). At the same time, he spoke of labor arbitrators as follows:

> There was a time when the line between "management" and "labor" was clear-cut. But we now have a professional class in between these groups. They are the arbiters who sit on ever-widening issues and render a unique public service. Those arbiters are the experts in the field, and their advice and wisdom are sorely needed. . . . They have retired to the sidelines, as judges do, leaving the contest to others. Their withdrawal robs the current debate of perspective and wisdom. That, however, is another aspect of the problem which I pass by. I propose here only that when a special pleader enters the list he show his colors.

Id. at 232. *But see* Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019, 1034 (1965): "Too much of the material which is now available consists of enthusiastic endorsement of arbitration by arbitrators who are making a living from it. . . ."

I share both of Mr. Justice Douglas' convictions. As to the first, law review writers certainly should always be identifiable in terms permitting informed evalu-

I

"Discovery" in Anglo-American law is a congeries of remedies used to elicit facts in litigation.[1] It has evolved to respond to *NOW*-problems; delay is its nemesis. Discovery is typically invoked before trial, but is available during its course. It permits prompt access to data or documents in the control of adversaries or other persons. Discovery discloses not only the identity of persons who may appear as witnesses, but also the substance of their contemplated testimony; it makes available documents and other evidence which may be submitted or which are relevant to the dispute. Thus, discovery produces information for use in the investigation and evaluation of the relative strengths and weaknesses in the positions of the disputants. This exposure often results in pre-trial settlements.

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ation of their scholarship. But I would also hope that their readers remain objective in measuring their performance, neither uncritically absorbing their reasoning nor hypercritically rejecting it without analysis. Judge Hays appears to view arbitrators as Galileans from whom no good can be expected because, as is commonly known, they normally are compensated by the parties for their time and judgment. As a sometime labor arbitrator and a full-time law professor (a blend of academe and the real world quite common among labor arbitrators), however, there is little doubt in my own mind that my career would look about the same had labor arbitration evolved on a no-fee basis. I would still have wanted to do substantially the same amount of arbitrating, would still have reacted in much the same way to the various problems I have encountered and still would have been seeking to analyze thoroughly their implications in much the same manner as I have in law review articles. Indeed, for all I know, I might also have been a good deal more casual about the impact of my decisions as an arbitrator had I not been all too aware that the parties to collective agreements were compensating me for whatever I might do for them (or to them). In my observation, arbitrators are keenly aware that they are economically beholden to both parties and, therefore, decisionally, to neither.

Ironically, it is a fact of arbitral life that, professor or not, he who both arbitrates and writes for legal periodicals surrenders a certain measure of acceptability with each analytical paragraph. Contrary to Judge Hays, the truly venal arbitrator, if he exists, is to be found neither in the BNA or CCH case reports, nor in the law journals. He publishes absolutely nothing but his name, rank and telephone number.

This leads me to Mr. Justice Douglas' second observation. I am not nearly so convinced that arbitrators have actually "retired to the sidelines" as I am that they should not do so. We have little enough comprehension of the adjudicative function. Experienced arbitrators, who may speak without the constraints of the judiciary, can help us understand the mind of the decision maker if they will speak with candor within the bounds of the propriety necessary to protect the parties. In my view, they also thereby may help to shape the dynamic evolution of new and promising uses for this ancient tribunal idea.

This is the first of three articles. The second will be *The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery,* to appear in the March issue of this *Review.* The third, *The Labor Board, the Courts and Arbitration —A Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose,* is scheduled for the April issue of the *Review.*

††† UNITED STATES ADVISORY PANEL ON LABOR-MANAGEMENT RELATIONS LAW, S. Doc. No. 81, 86th Cong., 2d Sess. 2 (1960) [hereinafter cited as COX PANEL].

[1] *See* Millar, *The Mechanism Of Fact-Discovery: A Study In Comparative Civil Procedure,* 32 ILL. L. REV. 261, 262 (1937).

Professor David W. Louisell of the University of California at Berkeley has written extensively and helpfully of discovery. *See* LOUISELL, MODERN CALIFORNIA DISCOVERY (1963) [hereinafter cited as LOUISELL]; Louisell, *Discovery and Pre-Trial Under the Minnesota Rules,* 36 MINN. L. REV. 633 (1952). In preparing this series of articles I have relied heavily on Professor Charles Alan Wright's excellent HANDBOOK OF THE LAW OF FEDERAL COURTS (1963).

There is a significant difference between the expectations of those who have voluntarily committed themselves to the arbitration of their future disputes and those who find themselves embroiled in litigation. Historically, an atmosphere of openhanded disclosure has existed among those who have resorted to arbitration. This atmosphere reflects an expectation that all of the facts of the dispute will be brought into the hearing so that, in the words of a 1596 English decree, a " 'friendly and quyett end' " to the matter may be had from " 'some indifferent gentlemen who are of understanding and dwell in the country where the controversy groweth and may thereby knowe the partyes and credytt of the wytnesses.' " [2]

On the other hand, the antagonistic nature of the adversary process was hardly conducive to full disclosure. Ultimately, a growing professional and judicial intolerance toward calculated or unwitting concealment of decisionally significant facts in judicial proceedings gave rise to mounting pressures for more effective discovery. These pressures have been met with favorable responses.

For years it has been commonplace to observe that discovery procedures have no place in arbitration.[3] Oddly, the assertion has gone unchallenged, even unstudied, although there is little judicial or scholarly authority to support it. Apparently, this repeatedly asserted, but largely unexplained, predilection against arbitral discovery arose in earlier years as a reaction to the functioning of commercial arbitration. This appears to be another instance in which a pattern of reasoning appropriate to one area of experience is improperly imposed upon another area. In reality there are a number of situations—referred to here as "discovery situations"—currently encountered by labor arbitrators, in which one of the parties to a collective bargaining agreement very much needs and wants some form of discovery, preferably in the context of arbitration. It appears that accumulating experience now challenges and eventually will overcome the old antipathy to arbitral discovery.

Concern here is with those disclosure disputes occurring during the term of collective bargaining agreements which contain provisions for arbitration. The major question is whether judicially developed discovery procedures are legally and prudently adaptable to labor arbitration and, if so, how and by whom? Response to this question requires identification and analysis of a host of fact and policy considerations. The solution to the principal inquiry, however, is of considerably less public significance than is an examination of the

[2] J. DAWSON, A HISTORY OF LAY JUDGES 168 (1960).

[3] *See, e.g.*, LOUISELL at 17; *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 943 (1961).

several areas of policy which must be accommodated in order to reach a sound conclusion as to the utility, if any, of legal discovery procedures in labor arbitration. This process of accommodation will be characteristic of any effort to draw on the accepted uses of law in response to the evolving needs of labor arbitration.

The principal questions to be drawn into focus are:

A. How much practical need is there for arbitral discovery? Would such discovery have utility for both employers and unions in solving real *NOW*-problems? What options might it afford them? To what extent is labor arbitration a competent mechanism for the administration of discovery procedures?

B. Do the respective evolutions of judicial discovery and of labor arbitration tend to affirm or to deny the viability of arbitral discovery? If utilization of discovery as an arbitral remedy is found desirable, how would it be related to relevant federal and state doctrines? How might interaction among courts, administrative agencies and labor arbitration best be arranged to permit an effective yet fair response to discovery situations?

C. To what extent is the National Labor Relations Board confronted with contractual refusals to disclose? Relative to the possible alternative utilization of courts or labor arbitrators, how effective is the Labor Board in discovery situations? How can the Board respond more effectively to disclosure cases during the terms of collective bargaining agreements?

Essentially, this will be a study of tribunal interaction. Our inquiry will involve the weaving together of a welter of existing bargaining realities and legal doctrines in order to fashion an appropriate remedy. It may be useful to state some conclusions at the outset. There are occasions during the terms of collective agreements when a party is seriously disadvantaged and the bargaining relationship significantly impaired by a contractually unwarranted refusal of the other party to disclose, upon request, needed bargaining information. The possible avenues of recourse for the disadvantaged party are a Labor Board proceeding or arbitration. But the Board's disclosure procedures are so archaic that the disclosure ultimately achieved through its intervention in no sense can be equated with "discovery." The Board's disability in this respect is structural, not doctrinal. It primarily involves its relationship to judicial review, the inexorable timespan hampering its disposal of the problem and its lack of proximity to the disputants—physically, psychologically and legally. Board in-

effectiveness means that the only viable remedy for a contractually wrongful refusal to disclose is to be found in arbitration.

The courts still must provide protection against the possibility of harassment or maladministration of arbitral discovery. Such protection is available in the federal district courts or equivalent state courts on an expedited basis under section 301 of the Taft-Hartley Act.[4] The Labor Board, of course, must retain its jurisdiction to respond to statutory abuses of the grievance procedure.[5] But the presence of disclosure problems should require first-instance resort to arbitration for discovery. Arbitral discovery should be backstopped only by expedited judicially imposed protective orders and, later, if appropriate, by the Board's condemnation of unfair labor practices, enforced by the courts of appeals.

A number of questions of desirability must be resolved before it may be concluded that arbitral discovery is an appropriate remedy enforceable under section 301 of the Taft-Hartley Act. Since courts lack sufficient experience with collective bargaining to function in place of labor arbitrators, and since the Labor Board is empowered to act exclusively of both arbitrators and courts in the first instance, why not simply assign the *NOW*-problems of refusals to disclose to the Board? Is there really a demonstrable need for an arbitral discovery remedy? Does "the law" preclude arbitral discovery? Would arbitral discovery result in the addition to the grievance procedure of unneeded (and unwanted) formalism, legalism or complexity? Would it needlessly add burdensome expense to arbitration, because of the introduction of technicalities requiring lawyers as advocates? Would nonlawyer arbitrators be able to administer discovery prudently and effectively? Would the availability of discovery unduly stimulate an adversary atmosphere? Would it introduce significant delays in getting the substance of the dispute resolved? Would discovery operate as a remedy stacked against either employers or unions? Would the availability of discovery lure one or the other party to embark upon "fishing expeditions"? Would discovery result in attempts to blackmail settlements or to harass, oppress or embarrass? Would it be used as a dilatory tactic or used to permit perjured testimony at the subsequent hearing? How would it be possible to obtain arbitral discovery relief in advance of arbitration? Would the testimonial privileges of witnesses be jeopardized by allowance of arbitral discovery? Is arbitral discovery too broad a remedy for run-of-the-mill grievances? Would

[4] Labor Management Relations Act, 29 U.S.C. § 185 (1964) [hereinafter cited as LMRA § 301].

[5] National Labor Relations Act, 29 U.S.C. § 160 (1964) [hereinafter cited as NLRA].

it be possible to have adequate protection against abuses of discovery without exorbitant cost? If discovery is desirable in labor arbitration, should it be administered by the courts, who are experienced with discovery, rather than by arbitrators?

The legal context in which these questions must be answered is federal.[6] Some state legislatures have recognized that discovery can be useful in arbitration.[7] But, in such states, the question of whether depositions are available in labor arbitration has been converted into a federal question in which federal policy preempts state law. A series of Supreme Court cases point the way to the conclusion that discovery depositions are now available in these states for use in federally regulated collective bargaining situations and describe the sequence of tribunal interaction in which discovery should be made available in labor arbitration.

In *Textile Workers Union v. Lincoln Mills*,[8] the court concluded that "the substantive law to apply in suits under 301(a) [of the Labor-Management Relations Act, which governs the enforcement of arbitration agreements] is federal law, which the courts must fashion from the policy of our national labor laws."[9] The Act, the Court observed, "expressly furnishes some substantive law."[10] But the Court recognized that some problems could not be solved by resort to express statutory provisions. Such problems are to be solved "by

[6] Whether an arbitral remedy will be recognized, of course, should be resolved primarily in relation to the nature and needs of collective bargaining. In 1955 the National Conference of Commissioners on Uniform State Laws, addressing themselves to arbitration generally in the context of commentary on their proposed Uniform Arbitration Act, were emphatic in rejecting arbitral discovery: "It would be most unwise and inappropriate in an arbitration proceeding to permit the taking of depositions, not to obtain testimony of someone outside the state, but for discovery purposes of the party." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1955 UNIFORM ARBITRATION ACT PROCEEDINGS 31.

But why? Surely in the course of arbitrating various types of issues there arise circumstances in which discovery can be the difference between justice assured and justice denied. Dogmatic exclusion of arbitral discovery in all circumstances is incompatible with the pragmatic flexibility of arbitration. "Perhaps the solution lies in approaching the problem not from the viewpoint of arbitration generally, but according to the type of issues involved. . . ." LOUISELL 20.

If it be argued that discovery is too expensive or time consuming to have utility in arbitration, the argument more properly might be addressed initially to an arbitrator or thereafter to a superintending court in the specifics of an alleged abuse in a particular case in which one party seeks to avail himself of the procedure. The power exists to avoid abuses. As we shall see, aside from isolated instances, expense and time consumption are rarely experienced hazards.

[7] For example, in 1963, California amended its arbitration statute to make discovery generally available in uninsured motorist arbitration. At the same session of the legislature, however, a bill was submitted which would have made resort to depositions available in the broadest terms to parties to arbitrations, whether for use as evidence or for discovery purposes. The bill (SB 683) was never reported out of committee. *See* CAL. INS. CODE § 11580.2(e) (West Supp. 1966); LOUISELL 20.

[8] 353 U.S. 448 (1957).

[9] *Id.* at 456.

[10] *Id.* at 457.

looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." [11] The Court was expansive in its mandate: "The range of judicial inventiveness will be determined by the nature of the problem." [12] The states were expressly preempted:

> Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.[13]

In *USW v. Warrior & Gulf Navigation Co.*[14] and *USW v. Enterprise Wheel & Car Corp.*,[15] the Court committed responsibility for the initial formulation of remedies to arbitrators. The Court reasoned that this is a sound allocation of power because a "labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." [16] "The labor arbitrator's source of law is not confined to the express provisions of the contract. . . ." [17]

The latter idea was reiterated by the Court in *John Wiley & Sons, Inc. v. Livingston.*[18] The "collective agreement is not an ordinary contract. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact . . . that it is not in any real sense the simple product of a consensual relationship." [19] Therefore the Court commissioned arbitrators to operate "within the flexible procedures of arbitration" to fashion solutions "which would avoid disturbing labor relations . . . ." [20] These solutions are not limited to substantive interpretations.

> Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.[21]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 363 U.S. 574 (1960).

[15] 363 U.S. 593 (1960).

[16] USW v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

[17] *Id.*

[18] 376 U.S. 543 (1964)

[19] *Id.* at 550.

[20] *Id.* at 551 n.5.

[21] *Id.* at 557.

The procedural questions contemplated by the Court in *Wiley* are those problems related to the internal operation of the labor arbitral process. They do not involve procedural issues extrinsic to the process. For instance, timeliness of a suit to enforce an agreement to arbitrate, determinable only by looking outside the terms of the collective agreement—to "law," in other words—is a procedural issue allocable by *UAW v. Hoosier Cardinal Corp.*[22] to resolution by courts applying state statutes. But timeliness of a grievance seeking to enforce an obligation contained in the agreement, assertedly violated by one of the parties to it, is intrinsic. It is determined only by looking to the terms of this single agreement. The answer is to be found in the internal law created by and governing these collective bargainers, not in the external law governing all bargains. It is a procedural issue reserved by *Wiley* for decision by arbitrators.

How discovery procedures shall be administered within an existing bargaining relationship is a delicate question which recently confronted the Supreme Court in *NLRB v. Acme Industrial Co.*[23] The Court set the principle of discovery in the collective bargaining environment as somehow coexistent with grievance procedures terminating in arbitration. The Court has not yet told us how this will work, undoubtedly because it is too early for the Court to know. But discovery is a right idea, even though it radiates ripples of complexity touching many important concepts and realities of our national labor policy.

We turn now to a consideration of *Acme Industrial*, since it serves as a useful introduction to the nature of discovery situations and to the problems of tribunal interaction in dealing with these situations.

II

In 1967, in *NLRB v. Acme Industrial Co.*,[24] the Supreme Court examined discovery in the context of collective bargaining during the term of an agreement containing an arbitration provision. The case presented a classic *NOW*-problem. In January 1964, the Union discovered that certain machinery was being removed from the company's plant. When union representatives asked about the removal, the company's foremen replied that since there had been no violation of the collective agreement, the company was not contractually obliged to answer the questions. Eleven grievances were filed promptly.

The agreement provided that "[i]t is the Company's general policy not to subcontract work which is normally performed by em-

[22] 383 U.S. 696, 704-05 (1966).

[23] 385 U.S. 432 (1967).

[24] *Id.*

ployees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work. . . ." [25] The agreement also contained the commitment of the employer that

> [i]n the event the equipment of the plant . . . is hereafter moved to another location of the Company, employees working in the plant . . . who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering . . . employees at such location.[26]

When the Company did not respond satisfactorily to the eleven grievances, the Union's president wrote the company president requesting

> "the following information at the earliest possible date:
>
> "1. The approximate dates when each piece of equipment was moved out of the plant.
>
> "2. The place to which each piece of equipment was moved and whether such place is a facility which is operated or controlled by the Company.
>
> "3. The number of machines or equipment that was moved out of the plant.
>
> "4. What was the reason or purpose of moving the equipment out of the plant.
>
> "5. Is this equipment used for production elsewhere." [27]

The company replied that it had no duty to furnish this information, since neither layoffs nor reductions in job classifications had occurred within the five-day period established by the agreement for the filing of grievances.

At that point, the union's only realistic options to vindicate its rights as it conceived them were: *one*, to press one or all of the eleven grievances to arbitration, with a section 301 [28] court order if necessary; immediately upon selection of the arbitrator to request an order from him compelling disclosure of the information; simultaneously to file a section 8(a)(5) [29] charge with the NLRB, thereby assuring that the matter would not be barred by the statutory limitation of six months; [30]

[25] *Id.* at 433.
[26] *Id.* at 433-34.
[27] *Id.* at 434.
[28] LMRA § 301, 29 U.S.C. § 185 (1964).
[29] LMRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).
[30] LMRA § 10(b), 29 U.S.C. § 160(b).

two, simply to file charges with the Board or seek arbitration exclusively. In either case, immediate judicial relief would be unavailable (assuming that the company resisted) because a court would be compelled by existing doctrines to withhold its own remedies and either order arbitration under the agreement or defer to the Board's jurisdiction under the statute.

The union elected to file a section 8(a)(5) charge on May 7, 1964. By not seeking arbitration for what was quite evidently a *NOW*-problem, the union inexorably committed itself to an extended timespan in its quest for discovery. A Trial Examiner heard the matter on August 24, 1964, and issued his Intermediate Report on October 7, recommending that the complaint be dismissed on the ground that the parties had established a contractual procedure for the resolution of this kind of dispute. Prompt acceptance of his recommendation probably would have resulted in arbitral discovery six months after the filing of the charge. On February 1, 1965, however, the Board rejected his recommendation. It found a violation and ordered the Company to "[f]urnish, upon request . . . information concerning the removal of equipment and machinery from its plant." [31]

By the time of the Board decision, the long delay had converted the problem from a question of discovery to a matter of vindication of a statutory right. The controversy then moved to the Court of Appeals for the Seventh Circuit which, on October 6, 1965, concluding that the Trial Examiner had been right in the first place, refused to enforce the Board's disclosure order.[32]

Thus, after two years, the union was told that it should have resolved its grievance through the contractual procedure. Normally, that would have been that; but the Supreme Court granted certiorari, adding another phase to the timespan of this discovery situation. On January 9, 1967, three years from the time when the concern of the union had first been aroused by the removal of the machinery, the Court reversed the Seventh Circuit: "We hold that the Board's order in this case was consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration which our decisions have discerned as underlying that law." [33]

The Court also stated that there "can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." [34] There was no doubt that "the duty to bargain unquestionably extends

[31] 150 N.L.R.B. 1463, 1466-67 (1965).
[32] Acme Industrial Co. v. NLRB, 351 F.2d 258 (7th Cir. 1965).
[33] 385 U.S. at 439.
[34] *Id.* at 435-36.

beyond the period of contract negotiations," into the period of the administration of the collective agreement.[35]

The Court placed great emphasis on the fact that the Board's order to disclose did not result in its "making a binding construction of the labor contract." [36] The Board had acted only on the assumption that the information requested was probably relevant and useful to the union in carrying out its statutory responsibilities. "This discovery-type standard," said the Court, "decided nothing about the merits of the union's contractual claims." [37] This was simply a "threshold determination" by the Board which "in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement." [38] Indeed, "[f]ar from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process." [39] It prevented the arbitral process from being overloaded with unmeritorious, unwinnowed grievances. The union, it felt, was entitled to evaluate the merits of its grievance first, rather than incurring the expense of arbitration "only . . . to learn that the machines had been relegated to the junk heap. Nothing in federal labor law requires such a result." [40]

The Court's observations, unfortunately, carry potential for considerable dislocation in that highly sensitive sector of the collective bargaining process in which the remedy of discovery is sought. It is certainly true that the grievance procedure must winnow out the vast majority of grievances prior to the final step of arbitration. By no means is it true, however, that for this purpose, reliance should be placed on the Labor Board, rather than on arbitration. Particularly dangerous to the sound evolution of a workable pattern of Board-courts-arbitration interaction is the Court's division of function in *Acme Industrial* between a "threshold determination," thought not to require arbitration, and the resolution of the substantive issues which would presumably be posed by discovery. Yet "[i]n the context of the plant or industry," the Court had more perceptively observed at an earlier date, "the grievance may assume proportions of which judges are ignorant." [41]

It takes no great prescience to imagine a court citing *Acme Industrial*, as it justifies its decision to administer discovery in a grievance dispute, instead of sending the parties to arbitration. After

35 *Id.* at 436.
36 *Id.* at 437.
37 *Id.*
38 *Id.* at 438.
39 *Id.*
40 *Id.* at 438-39.
41 USW v. American Mfg. Co., 363 U.S. 564, 567 (1960).

all, the reasoning would speciously go, it would thereby only be making a "threshold determination concerning the potential relevance of the requested information" [42] just like the Labor Board in *Acme Industrial.* This is reminiscent of the repudiated "arbitrability" analysis of *Machinists v. Cutler-Hammer, Inc.*,[43] whereby courts would take hold of the merits under the guise of determining whether the contract provided for their resolution in arbitration.[44]

There are few collective bargaining situations more sensitive and more demanding of whatever insights arbitrators may have acquired than the typical discovery situation. Discovery raises critical issues for each party. "Intrusion" is the spectre—intrusion either into the heartland of managerial discretion or into internal union affairs. If any "threshold" action of a procedural nature could be said to fit properly into the procedural competence of the arbitrator, as defined by the Court's rationale in *Wiley,* this is it. "Threshold determination" it may be. But its capacity to trip up the unwary or the inexperienced is great indeed, and a mistake here may frustrate whatever may occur thereafter in any arbitration on the merits.

It was curiously unworldly of the Court to observe that to oust the Board

> would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. The expense of arbitration might be placed upon the union only for it to learn that the machines had been relegated to the junk heap. Nothing in federal labor law requires such a result.[45]

In the normal course of an NLRB refusal-to-disclose proceeding, as the record before the Court in *Acme Industrial* emphatically evidenced, the union already has been forced to take its grievance "all the way through" about three years of procrastination, often being required to resort both to the Board and to a reviewing circuit court of appeals in order to gain access to the information affecting its claim. One has to be naïve indeed to conclude that those three years do not constitute an expense far greater than the cost of taking a grievance all the way through to arbitration. The merits of the grievance, in the abstract, might lie with the union, but, in the concrete, are enjoyed by the employer for at least those three years. This is very visibly evident to his employees, the union's potentially disgruntled constituency.

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[42] 385 U.S. at 438.

[43] 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd,* 297 N.Y. 519, 74 N.E.2d 464 (1947).

[44] The Supreme Court in 1960 denounced *Cutler-Hammer* as embodying "a principle that could only have a crippling effect on grievance arbitration." USW v. American Mfg. Co., 363 U.S. 564, 566-67 (1960).

[45] NLRB v. Acme Industrial Co., 385 U.S. 432, 438 (1967).

With what remedy can the Labor Board confront the kind of bargaining fiasco posited by the Court? As the record before the Court certainly made explicit, the Board, well over a year after the refusal, will issue an order which then takes another year or more to be enforced by a court, which sternly will direct the employer "on request of the union" to disclose the information which the union had sought futilely two or three years earlier. But after all, what has the employer lost by his unlawful refusal? Nothing. On the contrary, he has gained considerably, having enjoyed almost a three-year moratorium on the merits. He also has achieved a marked psychological advantage in the constant competition between the union and the employer for the loyalty of the employees. The prize is directly translatable into immediate bargaining power. This gain is thus the measure of the union's loss.

In contrast, the arbitrator has the legal power to make that kind of calculated nondisclosure quite costly for a recalcitrant employer or, for that matter, for an unresponsive union. As to the employer, the arbitrator, of course, can require payment of back pay to all employees who have suffered loss of compensation. And he also can fix the operative date as that upon which the union or an affected employee would have filed a grievance, but for the employer's wrongful refusal to disclose. He can cause reversal of the employer's actions in non-wage cases (for example, plant removal or subcontracting) to be effective on the date that disclosure properly was requested and wrongfully was withheld. The prospect of that remedial power is itself quite likely to result in counsel's disclosure advice being taken seriously by a stubborn employer. Board strictures, however, are of little financial concern to the same employer.

Thus, if Justice Stewart's hypothetical junk heap promptly had been taken into arbitration to remedy the refusal to disclose, and it then had turned out to be a rusting fact, the arbitrator, the agreement permitting (as it often would), would quite likely have assessed the employer for the entire costs of the proceeding (a remedy beyond the Board or the typical American court); most certainly he would have included any consequent wages lost during the period of time that the employer was so coy with his junk heap (a measure of damages impossible before the Board and unlikely in a court).

In contrast to the courts, the Labor Board has acquired that type of "institutional competency" [46] which enables it to be sensitive to

[46] The Court observed in *Acme Industrial* that the *Steelworkers* trilogy—*American Mfg. Co., Warrior & Gulf,* and *Enterprise Wheel & Car*—

> dealt with the relationship of courts to arbitrators when an arbitration award is under review or when the employer's agreement to arbitrate is in

these delicate issues. But the Board's expertise never is exercised in isolation. Its "institutional competency" is diluted, since it always must interact with the several circuits of the federal court of appeals. The judges actually co-author almost half of the Board's orders. Some 43 per cent of its 951 cases in fiscal 1965 resulted in some kind of judicial reaction.[47] The federal judges do not act pro forma, functioning submissively as silent partners of the Board. In 1965, the courts either modified or set aside the Board's orders in 42.5 per cent of the cases.[48] This substantial sharing of institutional responsibility, with the courts functioning as the dominant last-word partner, considerably diminishes the "institutional competency" of the Board, to the degree that the courts displace that tribunal's specialized occupational sensitivity to problems which simply are not perceptible to the courts.

Thus, the Court's equation of arbitrators and the Labor Board can be seriously misleading, unless this limitation on the expertise of the Board is recognized. It is not completely true that the "relationship of the Board to the arbitration process is of a quite different order" [49] from that of the courts to arbitrators. Thus the courts act as the Board's intellectual Siamese twin, by no means of like mind, often wrongheadedly tugging against the pull of their brother, to the detriment of the common purposes of stability and fairness.

A second problem with the Court's approach is that, however it may be categorized, the Board's action in response to discovery situations cannot possibly be said to be "relief." This is so, because "in the labor field, as in few others, time is crucially important in obtaining relief." [50] And of all of the bargaining situations in which the factor of time is paramount, disclosure problems are in the first rank.

Thus, it cannot be said that the Board or the courts have the requisite "institutional competency" to administer collective bargaining discovery. The arbitrator somehow must be fitted into a distinct role

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> question. The weighing of the arbitrator's greater institutional competency, which was so vital to those decisions, must be evaluated in that context. . . . The relationship of the Board to the arbitration process is of a quite different order.

385 U.S. at 436.

[47] 30 NLRB ANN. REP. 191, table 8 (1965), shows that there were 951 unfair labor practice cases closed after Board decision, of which 540 were closed prior to circuit court decree. Three hundred fifty-nine cases were closed after a decree and before Supreme Court action. But 52 required Supreme Court action. The vast majority of cases, 14,160 in 1965, are resolved prior to any decision by the Board, a statistic indispensable to preserving the Board as a viable administrative agency.

[48] There were 212 petitions to the courts of appeals in 1965 for review or enforcement, 122 being affirmed in full, 47 affirmed with modification, 7 remanded to the Board and 36 set aside. No cases were partially affirmed and partially remanded in 1965. *Id.* at 212, table 19.

[49] NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967).

[50] NLRB v. C & C Plywood Corp., 385 U.S. 421, 430 (1967).

which will capitalize on his direct contact with the parties, his capacity for prompt disposal of the issue and his insulation against judicial second-guessing. That requires that he be accepted as the primary tribunal for discovery.

There is little doubt that the Court wants to maintain and strengthen arbitration as a major forum for the resolution of labor disputes. On its face, the *Acme Industrial* reasoning would appear to reaffirm that commitment. But the Court, seeking conceptual accommodation, has run afoul of the pragmatics of the discovery situation. Allocation of an exclusive first-instance jurisdictional responsibility to the Labor Board, whether through the exercise of its own discretion or the exigencies of judicial review, would miss the necessities of discovery by 180 degrees.

Labor Board jurisdiction is indeed needed and vital. But it must be a superintending rather than a first-instance jurisdiction, and it ought not extend to interim procedures. The critical reality is that interim contractually-based procedures like arbitral discovery should be held to be administrable by the arbitrator exclusive of the Board. Expedited interim procedures responsive to the *NOW*-problems arising in the course of the operation of the grievance procedure are beyond the capacities of the Board, as it is presently structured. Its extended time-span stifles intelligent resolution of otherwise remediable problems. The decisional interaction on interim arbitral discovery orders should be between arbitrators and courts, under the protective aegis of Rule 30(b) of the Federal Rules of Civil Procedure.

Discovery issues are so important to the parties that arbitrators certainly can be expected to exercise arbitral discovery powers with considerable restraint and with prudent concern for whether the remedies contemplated actually comport with expectations current in the labor-management community. Their sensitivity in that respect will be shared in considerable measure with Labor Board members and their staff, who are also in continuing contact with that community. But it is quite improbable, except in isolated instances, that judges ever would have had occasion to develop that kind of awareness. To repeat, "[i]n the context of the plant or industry the grievance may assume proportions of which judges are ignorant." [51]

The Court in *Acme Industrial* readily could have articulated its own sense of the proper division of function and responsibility between the Labor Board and arbitration. Implicit in the disposition of *Acme Industrial* is the availability of a future assessment by the Court of the Board's efforts to establish an effective interaction between it and

[51] USW v. American Mfg. Co., 363 U.S. 564, 567 (1960).

arbitration, one which will leave to arbitrators the primary responsibility for the administration of the collective agreement. In other words, the Court has elected in *Acme Industrial*, as a matter of judicial administration, to permit the Labor Board initially to exercise the administrative rule- or decision-making techniques it has evolved over the years in the area of its expertise. But that initial freedom is subject, nonetheless, to the prospect of critical scrutiny by the Court to assure that the resultant interaction fashioned by the Board shall be in the best interests of national labor policy.

III

Arbitral discovery should be examined in a real-life context. In order to approximate that setting as nearly as possible, we shall briefly sketch the characteristics of the bargaining environment in which Apocrypha, Inc. and Local 711 function. Then we shall examine some of the *NOW*-problems of discovery presently found in bargaining relationships.

A. *Some Preliminary Observations on the* NOW-*Problems*

Several observations should be made at the outset. It must be emphasized that in most cases employers and unions would have no trouble in these situations, because they would freely disclose the requested information. Perhaps the information might not be supplied in quite the form desired, but it would be disclosed nonetheless, to the satisfaction of the party seeking disclosure. Indeed, there are many bargainers who, as a matter of policy, volunteer information even before a request, once its relevance has become apparent.[52]

Seven characteristics are common to most discovery situations. First, in grievance situations, the information sought is generally necessary for an intelligent and prudent determination of whether to press a dispute to arbitration at all. If the dispute is to be submitted to an arbitrator, the information will be needed for a realistic determination of the tactical positions to take in the course of the arbitration. Second, the party seeking discovery may lose important substantive

[52] Sometimes parties choose not to seek disclosure of relevant bargaining information. For example, there are some unions with no desire whatsoever to inhibit their bargainers by embarrassing them with the facts of the particular enterprise. As a bargaining gambit, they want no access to operational information other than that which is put on the bargaining table by the employer. Similarly, a number of employers prefer to remain ignorant of the internal affairs of the unions representing their employees. The Labor Act reinforces the latter forbearance, by barring employer "interference" in the internal affairs of unions. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964). It is important to recognize, however, that many employers would have it no other way, both as a matter of self-interest in effective bargaining and as a reflection of basic managerial philosophy, quite aside from the statutory policy.

rights if discovery is not granted and swiftly implemented. Third, the manner of the ultimate resolution of each dispute is of prime concern to both parties. Fourth, the disclosure necessarily will reveal details of the standard operating procedures of the disclosing party, including, on occasion, details of its relations with other persons and institutions. Fifth, the material disclosed may tend to produce insights and data valuable for future use in negotiations. Sixth, the decision whether to grant discovery at all and, if so, the particular method and extent of the discovery to be ordered involve delicate problems which are central to the collective bargaining relationship. The requisite cast of judgment in each discovery situation is one in which the decision-maker conceives himself to be responsive to the particular circumstances of the parties and not to some set of general concepts or rules extrinsic to their relationship. Clearly this involves an informed prudence in the decision-maker administering arbitral discovery. Seventh, an element common to these situations will be a sense of outrage at the prospect of "intrusion" into the internal affairs of the union or into management's discretion to operate the business.

These observations about discovery situations tend to support the Supreme Court's observation in *Acme Industrial* that there is a need for a specialized "institutional competency" in administering a remedy so enmeshed in the delicate process of collective bargaining. The necessary "institutional competency" can be achieved in arbitration, since the labor-management community can rely on the arbitrator's experience and prudence to serve as an effective governor of discretion. An arbitrator's abuse of discretion or lack of prudence will result in loss of acceptability as an arbitrator—he thereafter rarely will be called upon by the parties.

B. *The Enterprise—Apocrypha, Inc. and Local 711*

Apocrypha, Inc., manufactures a diverse line of products for commercial and government use at several plants. At its Alpha plant, one hundred men are employed as production and maintenance workers in Building A, and one hundred employees, characterized as "technicians," are engaged in Building B in what the company regards as developmental work. Ten years ago the National Labor Relations Board certified Local 711 to represent the production and maintenance employees in Building A, but denied certification for the technicians in Building B. The company's Omega plant, located elsewhere in the city, is not organized by Local 711.

Apocrypha and Local 711 have been parties to a collective bargaining agreement since the certification. The grievance procedure outlines

successive steps, geared to the authority structure of the company, through which a dispute is to be processed.

Step 1 of the grievance procedure provides for discussion between the aggrieved employee and his foreman in the presence of the union steward within five days of the incident. No written statement is required. If no settlement results within 48 hours, the dispute must move into Step 2 or be dismissed.

To qualify for consideration at Step 2, the grievance must be set out in a written statement, signed by both the aggrieved employee and the steward and submitted to the supervisor within seven days of the incident. The statement must contain all pertinent information, including the specific contractual provisions relied upon and the relief sought. Within three days the supervisor "shall" meet with the aggrieved employee and his steward to discuss the matter. The supervisor must render a written decision within forty-eight hours after this meeting.

The aggrieved employee may appeal in writing to the Plant Superintendent within forty-eight hours under Step 3. The Plant Superintendent must render a written decision within three days. If the parties remain at impasse, Local 711 may then demand arbitration. Step 4 provides for the selection of an impartial arbitrator.

Among the various other provisions in the collective agreement is a typical recognition clause, Local 711 being recognized as the sole and exclusive representative for all production and maintenance employees employed at the Alpha plant; a union shop provision; a management prerogatives clause; and a no-strike and no-lockout provision.

C. *Some* NOW-*Problems of Apocrypha and Local 711* [53]

Discovery Situation #1

On August 31, 1961, an Apocrypha employee asked the company's industrial relations manager if Local 711 could properly fine him and have him fired for producing parts in excess of a quota adopted by a majority of the union's membership. He just had been informed that he had been tried and found guilty of "violating trade rule 36—by producing an excessive amount of parts per day," and that his dues payments were to be applied to a fine of $30. Consequently, he became in arrears on his dues and liable to be fired for failure to pay them. He told the industrial relations manager that a number of employees similarly had been disciplined for violating trade rule 36, emphasizing

[53] As we examine the discovery situations in the following pages, it will be obvious that this study is not an effort to detail all possible variations in which the *NOW*-problems of discovery can occur in collective bargaining. But enough variation has been sought to show that discovery can have crucial practical consequences in those recurrent *NOW*-problems.

that neither he nor the other men wanted to make any trouble for the union, lest they be disciplined for "conduct unbecoming a union member" as well. The industrial relations manager immediately telephoned the union business representative and said there were rumors that the union was fining employees for overproduction. He said that Apocrypha regarded such a practice as a slowdown violative of the no-strike clause of the collective agreement. The union's representative answered that the company was intruding in the union's internal affairs and refused to discuss the matter further.

What options does Apocrypha have in these circumstances? The affected employees are not likely to complain to the NLRB about the union. The company can of course file charges with the Labor Board under either section 8(b)(1)(A),[54] 8(b)(3)[55] or perhaps both. Were it to do so and were the matter to spin out at the pace that it did in *Associated Home Builders of Greater East Bay, Inc. v. NLRB*,[56] (the case from which these facts were drawn), the time span would inexorably stretch out for Apocrypha as it did for the *Associated Home Builders*:

August 31, 1961
Union notified employee of fine for pace setting.

November 22, 1961
Union notified employee that dues would be applied to fine and that failure to pay arrearage might result in loss of job.

January 17, 1962
Section 8(b)(1)(A) charges filed by company.

April 5, 1962
General Counsel issued complaint.

June 11, 13, 1962
Trial Examiner heard the case.

July 25, 1962
Trial Examiner issued Intermediate Report finding union violated section 8(b)(1)(A).

February 14, 1964
NLRB issued decision modifying Trial Examiner's Report but adopting his conclusion that section 8(b)(1)(A) was violated.

October 29, 1965
Court of appeals denied enforcement of Board's order.

Time elapsed between chargeable act and court order: 50 months.

[54] LMRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1964).
[55] LMRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1964).
[56] 352 F.2d 745 (9th Cir. 1965).

This was obviously a dispute of immediate consequence. It is not difficult to imagine the tense and bitter feelings that the dispute may have aroused among all involved. For the sake of an effective bargaining relationship, it should have been resolved as rapidly as possible. Instead, it ground on for over four years and even then was unresolved on remand to the Board. After four years, the dispute had become disembodied, a contest about statutory phrases, far removed from the immediacy of outrage and the catharsis of final decision, pragmatically unrelated to the human situation which gave rise to it. Such maltreatment of a labor dispute takes a particular human stress, magnifies it through litigation, detaches it from the original and still unresolved grievance, and makes it a separate and distinct nettle.

Surely Apocrypha would prefer to avoid the kind of enervating litigation described here. The typical collective agreement permits either party to submit a dispute to arbitration,[57] and since we have hypothesized that Apocrypha and Local 711 have a typical agreement, Apocrypha probably can have the dispute so submitted, thus obtaining an early decision as to whether the union has violated the no-strike clause. In the *Associated Home Builders* case the complaint of the General Counsel indicated that there were a number of facts that remained unknown, even though the ensuing procedure before the Board and court resulted in a certain amount of disclosure. But consider the cost! After four years the disputants learned that all along they had been talking about the wrong section of the statute.

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[57] A recent Bureau of Labor Statistics study of collective agreements containing arbitration provisions (1,609 covering 7,172,100 workers) disclosed that 90 per cent of the agreements permitted either party to invoke arbitration. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAJOR COLLECTIVE BARGAINING AGREEMENTS—ARBITRATION PROCEDURES, BULL. No. 1425-6 (1966).

The current Bureau of National Affairs sample analysis of 400 agreements reports that

> Ninety-six percent of contracts provide for arbitration of grievances not settled by the parties themselves. An insignificant proportion of these agreements—less than 4 percent—specify that a dispute may be submitted to arbitration only by mutual agreement. *Under 11 percent, the union alone is entitled to such arbitration.* The rest state that arbitration follows automatically upon a deadlock or may be invoked by either party.

2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS § 51:6 (emphasis added). These more recent studies appear to outdate an apparently contrary conclusion in a 1964 BLS study reporting management complaints includible only "in a few agreements; that is, they were admissible into the formal grievance setup." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAJOR COLLECTIVE BARGAINING AGREEMENTS—GRIEVANCE PROCEDURES, BULL. No. 1425-1, at 5 (1964).

The 1966 BLS figures show that fewer than three per cent of the agreements studied allowed only the aggrieved party to request arbitration and less than five per cent limited initiation to the union. Furthermore, nine of the ten sample arbitration clauses affecting small employers enabled either the employer or the union to request arbitration. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. No. 1425-6, *supra* at 149.

Discovery Situation #2

Ten years ago, the NLRB refused to certify the technicians in Building B as production employees within the bargaining unit. Local 711's business agent was told by a former union member, now working in Building B, that production work was being performed there by the technicians. Upon inquiry, the personnel manager told the agent that no production work was being performed in Building B, and denied permission to inspect Building B to be assured that no production work was being done there.

In denying permission to inspect, Apocrypha relied on the management prerogative clause, reserving to it the power to manage the plant and direct the employees: the company desired to protect its confidential research and development work by preventing the union from inspecting Building B. Local 711 relied on the recognition clause which gives it the right to represent all production and maintenance employees. Any employees doing production work at the Alpha plant must be included in the bargaining unit.

The viewpoint of each party is understandable and the *NOW*-problem is evident. If Apocrypha has been violating the recognition clause, only early inspection can prevent a rearrangement of the work in Building B to comply temporarily with the clause. On the other hand, the company has a legitimate interest in protecting the confidentiality of its research work. But where shall the problem of inspection be resolved, before the Board or in arbitration? As the aggrieved party, the union has the initiative in selecting the forum.

In a similar case, *NLRB v. Otis Elevator Co.*,[58] where the employer refused the union's time-study expert access to the plant, the union elected the administrative route. The timetable developed as follows:

September 25, 1950
Union filed grievance complaining of company maladministration of incentive wage system.

February 8, 1951
After grievance discussions and company data did not resolve union's grievance, company refused union time-study expert permission to enter plant to make an independent determination.

January 22, 1952
Union having filed section 8(a)(5) charge, General Counsel issued complaint.

[58] 208 F.2d 176 (2d Cir. 1953), *enforcing as modified*, 102 N.L.R.B. 770 (1953).

March 4, 25, 1952
Trial Examiner conducted hearing.

October 14, 1952
Trial Examiner issued Intermediate Report finding no violation in refusing entry, because union had available a contractually "effective means" to obtain data through arbitration, but recommended that the employer allow union to copy time-study data of company.

January 24, 1953
Labor Board rejected Trial Examiner's reasoning on entry issue, and held that it was a violation of section 8(a)(5) to refuse entry as well as to refuse opportunity to copy.

November 10, 1953
Court of appeals modified Board's order to require data copying, but denied plant access as contractually unwarranted "invasion of [company] property by the union to assemble data." [59]

Elapsed time from chargeable act to court order refusing enforcement of Labor Board order: 34 months.

In a comparable case, *Librascope, Inc.*,[60] the aggrieved union chose arbitration. One hundred of five hundred bargaining unit employees were on layoff when the union sought access to determine if work which properly should have been done by the workers on layoff was being done by non-union employees. This clearly was a *NOW*-problem of some urgency to the union. The word was out among its laid-off unit employees that their work was being done by non-unit employees in violation of the collective agreement. A union that could not resolve such a pressing and vital issue would face a serious loss of confidence among its constituents in the plant. In this instance, the union chose arbitration to resolve this crucial discovery question and it received a relatively rapid decision. *Librascope* represents a typical time-span in arbitration:

[59] Judge Charles E. Clark rejected the reasoning of the majority. He noted that the company, in effect, had conceded that an independent study by the union might be needed when it sought to defer a ruling on it in any subsequent arbitration. "But if this is so," he reasoned, "if the Union may go behind a standard to examine its foundation, . . . no good reason is perceived for its denial at an early and effective stage in the procedure." *Id.* at 180. He then added a much-quoted observation:

> If the Union is to be allowed to acquire some information, it should not be stopped short of the most useful data it can develop; nor should it be forced to grope somewhat blindly through the very stages of grievance procedure, where adequate information is most likely to lead the parties to amicable agreement, to await an arbitrator-conducted study to the same end. . . .
>
> All the Board has given the Union is the right independently to examine and check the data underlying the standard so that it may intelligently handle its grievances and police its contract.

Id.

[60] 30 Lab. Arb. 358 (1958), (E. Jones, Arbitrator).

November 27, 1957
Company refused to grant union representative access.

December 3, 1957
Union filed grievance charging contractual violation in refusal to allow access.

April 3, 1958
Arbitrator issued award after hearing the briefs, holding that company violated agreement by denying entry.

Total consumption of time from chargeable act to final arbitral award: 4 months.[61]

Unlike the short time-span exemplified by *Librascope*, the extended time-span of a Labor Board proceeding can have a punishing effect on the prestige of the party seeking to rectify a bargaining affront. Prestige in this context has an economic value in its influence on the other party's willingness to make concessions. Prestige also affects the attitudes of employees toward the quality of their work or the attitudes of employers toward the needs which their employees deem important. On the other hand, while risking a loss of prestige and its economic consequences, the party charging a statutory violation enlists the investigative resources and litigation skill of the General Counsel's office and, if judicial enforcement is necessary, acquires the imprimatur of a declaration by a United States court of appeals that the respondent has engaged in "illegal" activities. There may be a tendency to underrate the impact which that kind of federal presence has on workers in their attitudes toward their jobs, their union and the enterprise. But that presence is no substitute for the remedy of discovery when discovery, rather than belated disclosure with a federal imprimatur, is what is needed.[62]

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[61] *Librascope* also indicates some of the tactical problems in discovery situations. Although the union had elected to try the issue on the merits prior to discovery, it could have continued the matter pending its investigation of the premises. This would have enabled it to avoid any time limitations in the collective agreement by having launched the arbitration, thus preserving its option to go forward or drop the matter, depending on the results of its discovery-aided investigation.

[62] Of course, a major consideration in assessing this option is that the charging party need not pay a thin dime for all that federal talent and time. So long as he is willing to refrain from being an intervenor, he need spend no money on the proceeding. This must also be a major factor in the Labor Board's determination in the context of a specific case whether to direct the charging party to exhaust its contractual remedy. The fact that a majority of unfair labor practice charges involve enterprises characterizable as "small businesses" should preclude the Board from establishing an inflexible contract exhaustion rule one way or the other in refusal-to-disclose cases. Two-thirds of the 1965 unfair labor practice situations received by the Board occurred in bargaining units with less than 100 employees. Half had less than 50 employees, more than a third had less than 30 and a fifth had less than 10. 30 NLRB ANN. REP. 210, table 18 (1965). Arbitration may be an exorbitant choice, affording no effective remedy to the charging party, although in some situations the financial burden may be reasonable for the parties involved. Also, electing the more cumbersome, albeit "free," procedures of the Labor Board, rather than the

Discovery Situation #3

Local 711 requested Apocrypha to discharge an employee who allegedly had not paid or tendered his dues within the time required by the agreement. The company suspected that the union frequently overlooked similar delinquencies, and that for several years some employees had not been required to pay any dues. The union maintained that the matter was its business, not the company's. The company asked to see Local 711's membership records to verify suspicion. The union angrily refused.

Apocrypha is in a dilemma. When a collective agreement makes union membership a condition of employment, the Board has held that the employer commits an unfair labor practice in refusing to discharge a dues-delinquent employee.[63] However, an employer who discharges an employee at union request can be held liable if the ground advanced by the union proves to be invalid. A union's ground is invalid if, for example, the requested action is really a discriminatory retaliation against one of its members.[64]

What should the company do? If it complies with the demand, it incurs the risk of a wrongful discharge for which it will have to respond in back pay. If the company refuses to comply with the demand, its situation is somewhat improved. It can either file a grievance itself or attempt to secure union agreement to submit the dispute to arbitration. If neither of these possibilities is available, and if the employer can demonstrate contractual arbitrability and the desirability of arbitral discovery, it can defend before the Board and request deferral to arbitration. In arbitration the employer can seek discovery in connection with its defense to the grievance. It is quite apparent, in any

expedited time-span of arbitration, actually may prove a more costly choice by the time the disclosure is obtained. The union in the *Acme Industrial* case might have done well to consider the "costs" of this course of action, particularly if any employees were on layoff while that machinery was being moved out of the plant. A Board proceeding also amounts to an exorbitant cost to the employer who wants to recoup actual damages suffered because of a no-strike pledge since such a remedy is unavailable from the Board. Actually, however, employers and unions quite often feel compelled to retain counsel and become intervenors, thereby undertaking a substantial cost in connection with the Board proceeding. Thus the thin-dime approach is often a fallacy.

[63] *E.g.*, Montgomery Ward & Co., 1967 CCH NLRB Dec. ¶ 20,992 (1966). Of course, a union does not violate the act when it strikes in reaction to an employer's unfair labor practice in order to compel it to stop the practice. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

However, the Labor Board has since construed *Mastro Plastics* to protect the striking employees only when they strike against "flagrant" or "serious" unfair labor practices, those which may be characterized as "destructive of the foundation on which collective bargaining must rest." Arlan's Dept. Store, Inc., 133 N.L.R.B. 802, 808 (1961) (quoting Mastro Plastics Corp., 350 U.S. at 281). *But see* Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 16-19 (1958).

[64] *E.g.*, Bricklayers Local 11, 1967 CCH NLRB Dec. ¶ 21,011.

event, that the immediate availability of discovery would obviate the serious temporal and economic difficulties presented by this problem.[65]

In the actual case from which these facts were drawn,[66] the union grieved the company's refusal to discharge. At the arbitration hearing, company witnesses indicated their belief that an inconsistent dues policy existed. The arbitrator asked the union if its books would disclose actual payments made. The answer was yes. At the arbi-

[65] There are other foreseeable instances where an employer will want to assess the alternative courses of action open to him. One worth noting here is a wildcat strike over the opposition of union leadership.

The employer generally has four options in such a situation. One is practical, three are legal. The utility of each depends on the circumstances. The first, which will be the most useful in most situations, is to shrug off the whole thing in order to build up the prestige of the union's officers; in that way, disgruntled employees will be more inclined to be led by the officers, rather than to strike whenever they are upset. Several questions are relevant in considering this course of action. What damages actually were incurred? Has this kind of wildcat action occurred before? What prospect is there, given the individuals and plant involved, that the union officials can actually be expected to lead? The answers to these questions will also be relevant to the employer's election among its other options: to file a § 8(b)(3) charge with the Labor Board; to bring an action for damages under § 301; to bring the matter to arbitration.

The extended time required to file and litigate a § 8(b)(3) charge may make that option undesirable. Boeing Co. v. UAW, 370 F.2d 969 (3d Cir. 1967), illustrates the third option open to employers in anticipation of a no-strike case. Certain union members admittedly engaged in a work stoppage constituting a strike, and Boeing brought an action for damages under § 301. In its answer, UAW admitted the strike action of the members, but denied liability for their activities. UAW also moved for a stay of the action pending arbitration of the no-strike clause violation issue. The federal district court refused to grant a stay, and the circuit court affirmed on appeal. The Third Circuit analyzed the arbitration provisions under the *Warrior & Gulf* standard: that an order to arbitrate should be granted "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 970 (quoting USW v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960)). The court found that the Boeing-UAW grievance procedure was "employee oriented. . . . The entire procedural structure is designed to resolve only the employees' grievances against the company." 370 F.2d at 971. Therefore the case was unlike Drake Bakeries v. Local 50, Amer. Bakery & Confectionery Workers, 370 U.S. 254 (1962), in which the Supreme Court held an employer's damages claim to be arbitrable rather than actionable, because there was a comprehensive grievance procedure calling for the arbitration of "all complaints, disputes or grievances" about "any act or conduct or relation between the parties hereto, directly or indirectly." *Id.* at 257 (quoting article V of the arbitration agreement). The Boeing-UAW agreement was more like the employee-structured grievance procedure in Atkinson v. Sinclair Ref. Co. (Atkinson II), 370 U.S. 238 (1962) in which the Supreme Court had held that the arbitration clause was "not susceptible to a construction" that the plaintiff was bound to arbitrate the issues involved in its action for damages. *Id.* at 241. Therefore, in the *Boeing* case, the Third Circuit concluded that because there was no contractual obligation to the contrary, "a reluctant party is free to pursue any available legal remedy to redress its grievances." 370 F.2d at 970.

Counselled by *Boeing*, an employer who wished to have quick access to arbitration in a no-strike situation would want to have the broader phraseology of the *Drake Bakeries* arbitration provision. The employer, who would prefer to be in a state court and would prefer damages from the court rather than an arbitrator, will want the *Boeing* arbitration terminology in his collective agreement. The availability of discovery to the employer is apt to be linked to his standing to initiate arbitration. Of course, he can trigger an arbitration, if he wishes, by disciplining employees and request discovery from an arbitrator in connection with the union's subsequent grievance.

[66] Unpublished opinion from the author's files.

trator's suggestion, the books were readily and willingly obtained at the lunch break for company inspection. A stipulation was agreed to within half an hour. One more drop of jaundice in the blood of either of these parties well could have pushed the dispute into Labor Board procedures averaging sixteen months to initial decision and twenty-eight months to enforcement order. Instead, an arbitral award ordering the employer to dismiss the delinquent employee[67] was issued within six months.

Discovery Situation #4

Under the agreement between Apocrypha and Local 711 the employer must accumulate and pay over to the union for credit to the Health and Welfare Fund three per cent of the gross weekly payroll. The payment must be accompanied by an itemized statement giving the name of each worker and the amount credited to him. Local 711 found evidence of seven cases in which there were discrepancies of over fifty per cent between the entries on the employer's state disability reports and the amounts reported for the purpose of the three per cent fund. Upon inquiry, Apocrypha acknowledged the discrepancies and paid over the amount due. The union then sought to examine the employer's books and records to determine the cause of the discrepancies and to see if others existed. Apocrypha refused.

What are Local 711's options? It could file a section 8(a)(5) charge with the Labor Board. But that procedure is an after-the-fact remedy at best, and certainly does not amount to "discovery." In these circumstances an unfair labor practice charge is far too cumbersome; a party can fend off disclosure long enough to "clean up" its books.

In the actual case from which these facts were drawn, *J. B. Lion Corp.*,[68] the union elected to arbitrate. However, unlike the Apocrypha situation, they also had negotiated a specific provision for union access to the employer's books and records "having any bearing on the question involved."[69] The union first became aware of the discrepancies in June of 1966. By September 27, 1966, it had an arbitrator's award compelling disclosure, which, under federal law, was final and binding. If the employer had resisted, the union probably could have obtained

[67] The status of the delinquent employee presents a potentially serious problem. In this case he was a close relative of the employer and his interests were well protected. If the interest of the employee is not so protected, ought he then be enabled to join as a "party" to assure adequate attention to his rights? *See* the discussion in Maier Brewing Co., 45 Lab. Arb. 1115, 1122-23 (1965) (E. Jones, Arbitrator).

[68] 66-3 ARB ¶ 8793 (1966) (Summers, Arbitrator).

[69] *Id.* at 5734 (quoting from article 8 of the collective agreement).

enforcement within a few weeks in either a federal district court or a state court.

In contrast to the brevity and ease of implementation of arbitral discovery illustrated by *J. B. Lion*, the *Boston Herald-Traveler* cases [70] illustrate the potential difficulties inherent in seeking a solution to a similar problem in the NLRB-court of appeals process. The Boston newspaper enmeshed a local of the International Typographical Union in a frustrating and readily utilizable pattern of avoiding disclosure. The employer refused, on January 2, 1952, to disclose information detailing the composition of its payroll. Two years and another contract negotiation later, the First Circuit Court of Appeals enforced the Board's order that the Herald-Traveler "[u]pon request, furnish to the Union wage data concerning work classifications and salaries of all employees in said unit." [71] Three weeks before the decision, the employer disclosed data, but continued to withhold information linking the names of employees to specific wage rates. In support of its refusal, the employer argued that the intervening negotiation and contract execution demonstrated that the union did not really need the information.

Once again the union filed a section 8(a)(5) charge. A year and a half and still another contract negotiation later, the court of appeals, observing that in "dozens of cases" the Labor Board had ordered disclosure of precisely this kind of information, enforced the Board's more specific order that the employer, "[u]pon request furnish to the Union the name of each employee in the bargaining unit together with the earnings of each named employee." [72]

Total time in getting this *NOW*-problem of discovery to the brink of resolution was three and a half years, and two contract negotiations were conducted without the benefit of the wrongfully withheld information. Obviously, this is compelled disclosure which neither can be called "discovery" nor regarded as "relief." Time lags such as this have prompted the Board to note that sections 8(a)(5) and 8(b)(3) are "increasingly losing significance" [73] due to the time lag between the failure to bargain and the ultimate "relief." [74]

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[70] Boston Herald-Traveler Corp., 102 N.L.R.B. 627 (1953), *order enforced*, 210 F.2d 134 (1st Cir. 1954); Boston Herald-Traveler Corp., 110 N.L.R.B. 2097 (1954), *order enforced*, 223 F.2d 58 (1st Cir. 1955).

[71] 210 F.2d at 136 (quoting 102 N.L.R.B. at 629).

[72] 110 N.L.R.B. at 2100. Perhaps it is an unduly cynical note of caution to observe that this kind of delay *could* come about as a joint charade of an employer and a preferred union to fend off prospective decertification efforts by another union. However, the record in *Boston Herald-Traveler* does not suggest that kind of statutorily wrongful conduct (not that it would be apt to)—there is no suggestion in it of the interest of any competing union.

[73] McCulloch Corp., 132 N.L.R.B. 201, 214 n.46 (1961).

[74] But "relief" is indeed a euphemism for what happens in these discovery situations. The Cox panel in 1960 found that contested unfair labor practice cases aver-

Discovery Situation #5

Local 711's agent came to the plant at the request of the personnel manager and was given written notice of the discharge of fifty-five named employees. There were one hundred men in the bargaining unit. The cause was stated to be "dishonesty." The personnel manager refused to disclose any other information or even to discuss the matter. Upon written demand by Local 711 for details, Apocrypha replied in a letter that "The Company has and will present such evidence as is needed to sustain its action in all 55 cases should Local 711 elect to pursue the matter in arbitration."

Local 711 is in a very tough spot. The employer is not apt to draw fifty-five misfires in this sequence of discharges. Nor do the odds favor his complete success. It is more likely that some of the employees are completely innocent and their dismissal unwarranted, while other employees probably are guilty of acts making their discharges sustainable for "just cause." [75] If Apocrypha can successfully force Local 711 to pursue its claims in arbitration, without prior discovery, the union is severely disadvantaged. They will be put to the expense and trouble of litigating the claims of those employees whose discharges were proper. Further, the grievances of those employees who are innocent of wrongdoing might well be prejudiced if they are intermingled and tried together with those that are clearly fatuous.[76]

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aged almost 29 months from filing of the charges to issuance of an effective decree. This finding led the Panel to make the observation quoted at the outset of this study: "A remedy granted more than 2 years after the event will bear little relation to the human situation which gave rise to the need for government intervention." COX PANEL, *supra* note †††, at 2.

In examining the Labor Board's fiscal 1958 experience, the Cox Panel found average elapsed time of 230 days from filing to issuance of the trial examiner's report; 235 more days to get the Board's decision; and an additional 378 days to obtain a court decree enforcing or setting aside the Board's order. Of this calendar array the Panel concluded, "These shocking delays seriously affect the usefulness of the National Labor Relations Act." Its conclusion was that "No change in the substantive provisions of the Taft-Hartley Act is more important than speeding up the processes of decision in unfair labor practice cases." COX PANEL, *supra* note †††, at 10-11. The Board has since tightened up its timetables in several areas, but the average timetable in discovery situations has remained substantially unchanged.

[75] As an instance of difficult competing values and their relationship to problems of credibility, which can arise in situations in which "just cause" must be determined, see Yellow Cab Company, 44 Lab. Arb. 175, 445 (1965) (E. Jones, Arbitrator) (discharge for disloyalty of meter mechanic whose disclosure to competitor for city-wide franchise resulted in public knowledge that employer had unlawfully rigged its cab meters).

[76] Normally, unmeritorious claims tend to be filtered out in the pre-arbitral steps of the grievance procedure. The operation of a large plant can generate nearly one thousand grievances a year, with perhaps a dozen or less going on to arbitration. The Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967), expressed concern over the possibility that excessive tenacity by either union or management might so "overburden the arbitration process as to prevent it from functioning successfully." *Id.* at 192. The Court cited the testimony of a Packinghouse Workers officer in *Vaca* that only one of 967 grievances filed in all of Swift's plants during 1961-1963 was taken

Unmerited grievances by employees who profess outrage at their employer's warranted disciplinary action cannot but impair the opportunity for a fair hearing for those who should not be discharged but are caught up in a hotchpot hearing. Furthermore, the plight of any wrongfully discharged employee can be desperate. "Dishonesty" charges preclude interim employment and can also constitute the "misconduct" which also bars unemployment compensation. Household budgets in our credit economy are not usually set up to bear this kind of stress, nor can a local union normally undertake to finance the discharged employee. In the background of course is the grim prospect of criminal prosecution. The union's own survival as bargaining unit representative was also at issue because it felt that a frontal assault was being made on its status and that an employer petition for decertification was imminent since a majority of the bargaining unit had been terminated. It is clear that these difficulties would be substantially obviated if Local 711 were able to force Apocrypha to disgorge the relevant information at the earliest stage of the grievance procedure. It might be noted that such disclosure certainly would not be detrimental to the proper interests of Apocrypha. At most, it would deprive them of an undeserved tactical advantage.

In the unpublished case from which these facts were drawn, the employer insisted on trying all claims before a single arbitrator. At the initial hearing, the union requested a continuance and a detailed discovery order. It wanted the data, as counsel put it, "So we might know what kind of cases we actually have. We might settle some, all, or none. We can't know at this stage." The union stated that, after reassessing the credibility of its own witnesses, it might well withdraw some of the grievances. The union had already filed a section 8(a)(5) charge with the Labor Board, but much preferred to get its relief in arbitration because of the large number of men who would remain unemployed and unemployable until cleared.

The arbitrator prudently elected to proceed at least through the complete presentation of the company's first grievance, holding the union's cross-examination in abeyance until all direct testimony had been taken. At that time, the union renewed its motion and the arbitrator granted it. The parties drafted a discovery order. The hearing was continued pending completion of the discovery procedures.

to arbitration. The amicus brief of the AFL-CIO stated that less than .05 per cent of all written General Motors grievances were arbitrated and only 5.6 per cent of United States Steel grievances processed beyond the first step went on to arbitration. *Id.* at 192 n.15. Such testimony reflects the importance of the multi-step grievance procedure to employee, employer and union. An employee may air his complaint with the assurance that it will receive attention and, if meritorious, union support. The employer and the union are provided with a system in which problems of varying difficulty can be resolved within appropriate limits of formality and time.

The section 8(a)(5) charge was withdrawn. Within several months the hearing had been reconvened and was heard on the merits, some of the discharges being sustained, most being set aside. Outside of arbitration it would have taken years to unsnarl those fifty-five cases.

Discovery Situation #6

Local 711 and the various employers which signed collective agreements with it[77] established an industry improvement program,

[77] Multi-employer bargaining situations are markedly increasing in number. One variation is that involving one employer and a union bargaining about group interests affecting many employers. This version, as illustrated in Davidson Brick Co., 31 Lab. Arb. 725 (1958) (E. Jones, Arbitrator), has been employed in the Southern California brick industry. Another approach, referred to as "multi-employer bargaining," involves group bargaining between a union and several employers joined together in a common front. *See, e.g.*, NLRB v. Johnson, 368 F.2d 549 (9th Cir. 1966). Bargaining patterns are emerging which suggest that discovery techniques will become increasingly necessary to the administration of grievance procedures. Two stand out particularly.

First is the marked increase in multi-employer bargaining in the past ten years. In 1951, a Bureau of Labor Statistics study found 20 per cent of union members covered by multi-employer agreements. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR-MANAGEMENT CONTRACT PROVISIONS 1949-50, BULL. No. 1022, at 30-31 (1951). A 1961 study disclosed that the gap had narrowed significantly between the number of workers covered by multi-employer agreements and those subject to single-employer contracts. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAJOR UNION CONTRACTS IN THE UNITED STATES, 1961, BULL. No. 1353, at 2-3 (1962). The percentage had increased from 20 to 47 per cent in the decade.

The second development in bargaining patterns is a trend toward contractual commitments extending over longer terms. Thus, in California in the period 1955-1960, contracts of one year's and two years' duration accounted for slightly over half the total, while for the period 1960-1965, BLS studies show that contractual terms extending three years or more have become commonplace, while the one year and two year agreements have become exceptional. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, COLLECTIVE BARGAINING PATTERNS, SAN FRANCISCO, AND LOS ANGELES, 1955-65, REGIONAL REPORT No. 9 (John L. Dana).

When a union deals with an association of employers in relation to a grievance, it is apt to find itself in a more formalized procedural situation than when it confronts a single employer. A union which is responsive to its membership has different and more complex problems in achieving flexibility in adopting or changing bargaining positions than a single employer is apt to have. But a group of employers becomes a constituent process itself, and two constituent processes at loggerheads present an even greater complexity. As both parties tend to become extremely sensitive to nuances in the sequence of events and in each other's actions or omissions by crediting them with possible tactical significance in the "winning" of the "case," the prospect of early disclosure diminishes considerably. A litigation-like environment tends to move the parties away from negotiation and toward tactical manipulation of the grievance procedure. It quite naturally puts a premium on discovery for whichever "side" is disadvantaged by the lack of access to information in the control of the other. This attitude produces an evasiveness which, in turn, leads to a felt need for disclosure. And the tendency is increased, at least to the extent that the employer association's administrator lacks sufficient political strength among his constituents to play a dominant role in mediating settlements between the union and one of his constituent employers. A strong administrator may not wish to go to arbitration at all, particularly when he confronts a relatively weak union. There is enough variety here to make generalization precarious without more detailed studies.

The addition of another professional buffer between an employer and his employees, who are already bargaining through an agent, might not alone provoke discovery situations. But when this relationship is considered in light of the several years' term of the typical collective agreement, it becomes apparent that a party disadvantaged by the unavailability of information will find it increasingly difficult to bear with its lack of knowledge and hope to gain disclosure at the next round of negotiation. This

administered by the union. Employers agreed to contribute one cent per hour per employee toward institutional advertising and promotion of one of the industry's products. Apocrypha is three times the size of any of the other contributing employers. Its operations are on a year-round basis with overtime rarely required. Its smaller competitors operate on a seasonal basis, shutting down completely in the winter months and operating overtime most of the remaining part of the year. Apocrypha learned that the other employers were reading "one cent per hour" to refer only to straight time hours rather than total hours worked including overtime, thus putting Apocrypha at a substantial competitive disadvantage. Apocrypha's management, convinced that Local 711 was not enforcing the obligation to contribute against many of the smaller employers, demanded to see the union's books and minutes relevant to the union's administration of the program. The union refused on the ground that Apocrypha has no right to inspect books in order to learn about the internal affairs of the union and its bargaining relations with other employers.

In *Davidson Brick Co.*,[78] the case from which these facts were largely (but not entirely) drawn, an employer simply refused to make any further contributions to the program when it became suspicious that its competitors were in default. After discussions, the union wrote the company stating that the other manufacturers were paying in compliance with the agreement and demanding that the company do the same. The matter was processed to arbitration, and the decision was issued three and one-half months after the impasse was reached. The award compelled the company to contribute its share to the program.[79]

Did the employer have an alternative to refusing to make its payments? Initially, the union was sympathetic to the company's

is so whether the withholding is due to a tactical decision, the expense of disclosure, "principle" or any other motivation. The more remote the next round of negotiations for a new agreement, the more necessary disclosure may be to the effectiveness of the present administration of the grievance procedure.

Furthermore, the disputes occurring during the terms of collective bargaining agreements are becoming more complex, the interests of more people are becoming enmeshed in them and the subjects are more technical and of greater import to the continued effectiveness of both employers and unions. If the "need to know" standard governing accessibility to national security information were to have its counterpart here, it should be noted that occasions where there may be said to be a "need to know" in bargaining are increasing in proportion to the complexity and importance of issues submitted to grievance administration which terminates in arbitraton.

[78] 31 Lab. Arb. 725 (1958) (E. Jones, Arbitrator).

[79] At the same time, the arbitrator suggested that either the union or the company could obtain a § 301 order from a federal court compelling the affected employer to participate in an accounting arbitration, which is to say, in arbitral joinder. That procedure is discussed in Jones, *On Nudging and Shoving the National Steel Arbitration Into a Dubious Procedure*, 79 HARV. L. REV. 327 (1965); Jones, *A Sequel in the Evolution of the Trilateral Arbitration of Jurisdictional Labor Disputes—The Supreme Court's Gift to Embattled Employers*, 15 U.C.L.A. L. REV. — (April, 1968).

plight. Its records, however, disclosed only the sums received, not the basis of the computation used by each employer. Yet the union normally would be rather reluctant to launch grievances against various employers at the request of one of them, without independent evidence of default.

But in the hypothetical situation, Apocrypha may have a remedy if it can initiate arbitration under its collective agreement or as a response to a grievance by the union to compel payment of the money. It can then compel Local 711 to make some kind of disclosure of union records, showing, perhaps, the sums collected and the number of employees involved, without unduly intruding into the union's collective bargaining with the other employers. The extent of disclosure and intrusion will have to be determined with care by the arbitrator. The union well may feel that its own institutional interests, relative to both its members and the other employers, will be protected by a discovery procedure compelling it to disclose the requested information. The employer may also elect to seek a joinder award from the arbitrator, certifying that the dispute ought to be resolved in a proceeding in which all affected employers and the union are joined. Such an award would permit the employer to seek an order of joinder from a court in a section 301 proceeding.

Discovery Situation #7

Apocrypha removed several machines from one section of one of the reinforced concrete floors of its Alpha plant, leaving holes in the floor. Management informed Local 711 that it planned to subcontract the repairs, since its own maintenance crew was completely booked and would have to work extensive daily overtime in order to repair the holes. Local 711 responded that Apocrypha was "subcontracting the Union to death." It demanded that management submit detailed schedules showing the jobs that the maintenance crew was scheduled to do. It also demanded the right to examine and copy the documents in Apocrypha's files, detailing each instance in the past five years in which bargaining-unit work had been subcontracted. The demand included all invoices, correspondence, bids and acceptances of bids and lists of Apocrypha employees who were on layoff or available for overtime work during times in which the work was contracted outside the bargaining unit. Management refused the demand.

Subcontracting has been an important issue in American industry for many years. It has been observed that in some industries, such as the steel industry, a "common law" has emerged in arbitral awards.[80]

[80] Kaiser Steel Corp., 44 Lab. Arb. 25, 28 (1965) (I. Bernstein, Arbitrator).

Where the collective agreement is silent on the issue, arbitrators have tended to consider the agreement as a whole, inferring a limiting intent from provisions like the recognition and seniority clauses. An "implied limitations theory" has evolved which requires that neither the complement of regular employees nor the work recognized as belonging to the bargaining unit shall be reduced arbitrarily or unreasonably by subcontracting.

What then of the union's requests for disclosure? On the facts as given, it is probable that the Labor Board would conclude that there was a section 8(a)(5) failure to bargain in good faith when Apocrypha refused to disclose at least the details of its prospectively scheduled jobs for the cement crew.

On the other hand, the request for access to the company's subcontract files would present greater difficulties. The Board might require such disclosure if there were intimations in the record of bad faith on the part of the employer in the past. In any event, the odds are that a court of appeals would feel the five-year access to the files was unduly intrusive.

The point is that a year and a half or so after such a dispute becomes a *NOW*-problem, the Board really cannot respond to it with very much flexibility. The Board is remote in time and space from the actualities of the empty holes and the schedule of the cement crew. It must also reckon with a skeptical court looking over its shoulder, prepared to modify or vacate its disclosure order. Moreover, it is ridiculous to frame a solemn Labor Board order directing the employer to disclose the subcontracting plans a year or two later "on request." Who really cares? This is no longer a discovery situation. In the minds of the parties it has by this time taken on its own separate identity as a litigational *cause celebre*, utterly removed from good-faith bargaining, disassociated from any bargaining utility.

How would this problem be worked out in arbitration? Undoubtedly, an arbitrator would suggest and, if necessary, would order disclosure of the cement crew schedule. Before granting the request to examine the company's files, he would want to hear a good deal about the necessity for reaching back to other problem situations and about how the past information would be helpful in resolving a present and fairly well-defined subcontract problem. He would want to know what facts prompted the union's inquisitiveness. In other words, he would try to learn whether the union's interest in the files is legitimate. He might inquire into the possibility of a stipulation drawn by Apocrypha and Local 711, after they had gone over the company files together out of his presence. If more detail than that was sought, or

a standoff between the parties was apparent, he might suggest that the company produce a sample for the most recent year. Perhaps a complete file on only one or two transactions would be sufficient. Local 711's suspicions very well might abate, if the employer were ready to bring in representative material for discussion.

In this kind of situation, my observation is that the labor arbitral process typically exhibits a certain functional inclination to what accurately might be called a skeptical receptivity. It would be unusual for the arbitrator either to rule out access to the files altogether or to allow the cement crew hearing to become bogged down in a dispute over access to five-year-old files. Flexibility in such matters is a practical necessity in which the Labor Board simply cannot indulge, whatever may have been the expectations for its expertise in earlier years.[81]

But the vocation of the labor arbitrator is rooted in a flexible pragmatism. His is the task of adapting existing ideas, legal and practical alike, to the new shapes of old problems that are pressed upon him through the grievance procedures of collective bargaining agreements. The *NOW*-problems of these discovery situations demand precisely the kind of response to which he is accustomed. Quite predictably the parties will object if he allows discovery to become unduly intrusive or unreasonably unavailable. That is a tension which, when coupled with the necessity of decision, results either in arbitral prudence at a hearing or arbitral solitude for a long time thereafter. Therefore arbitral discovery would predictably proceed as a tentative venture, a cautious feeling of relevance and necessity, quite unlikely to result in either a dogmatic exclusion of inquiry or a headlong plunge into data.

Discovery Situation #8

Several months before the expiration of the existing agreement, representatives of Local 711 and Apocrypha met to negotiate the new contract. At the first meeting, company negotiators stated that the Alpha plant was operating at 75 per cent capacity and the company needed to improve quality and reduce costs. It therefore required a free hand in production scheduling and in employee job assignments.

81 Since 1947, the Board has had to respond to the operation of a judicial appellate process to which its record in each case is submitted for critical scrutiny. Congress has made it clear, according to the Supreme Court, "that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); *see id.* at 477-91. The Court observed that Congress expressed a mood of ". . . disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions." *Id.* at 488. Thus, it concluded, "courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions . . . influenced by a feeling that they are not to abdicate the conventional judicial function." *Id.* at 490.

The company proposed that overtime premium pay be eliminated and that it be relieved of the necessity to fill jobs by seniority. Company negotiators maintained that concessions were essential to the Alpha plant's survival. They explained that Apocrypha requires each plant to sustain its share of the corporate overhead and Alpha had fallen considerably behind the Omega plant. In response, Local 711 negotiators demanded the profit figures and personnel records for the Alpha plant and an inventory of all production equipment acquired in the past three years. Company negotiators responded that, since Apocrypha's financial records would not be helpful, they would not be disclosed.

In the actual case from which these facts were drawn, *NLRB v. Celotex Corp.*,[82] the time span was as follows:

February 12, 1962
Negotiations for new contract were commenced with company; plight described; gross profit and loss demanded by union.

March 8, 1962
Current collective agreement expired.

March 29, 1962
Section 8(a)(5) charges filed, and amended on April 4, 1962.

May 16, 1962
General Counsel's complaint issued.

July 9-14, 1962
Trial Examiner conducts hearing.

July 28, 1962
New two-year contract signed effective to March 8, 1964.

June 13, 1963
Trial Examiner issued Intermediate Report, recommending order "to disclose . . . upon appropriate request therefor during collective bargaining negotiations, financial records of the Respondent which said Local is entitled to see," but noting that union may not be entitled in subsequent negotiations because company might not demand like concessions in 1964.

Whatever may be "the conventional judicial function," it is certainly not regarded as pragmatic or flexible by the judiciary. It is, instead, one constricted by preceptions of, as Cardozo put it, "restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer [to] hedge and circumscribe his action. They are established by the traditions of the centuries. . . ." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 114 (1921). The "conventional judicial function" is, in Learned Hand's phrase, "a self denying ordinance which forbids change in what has not already become unacceptable." The result is judges who "are curiously timid about innovations." Hand, *The Contribution of an Independent Judiciary*, in THE SPIRIT OF LIBERTY 158 (2d ed. I. Dilliard 1953).

[82] 364 F.2d 552 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966).

February 20, 1964
Board issued order as recommended.

March 8, 1964
Collective agreement two-year term expired.

June 28, 1966
Fifth Circuit Court of Appeals ordered disclosure.

December 12, 1966
Certiorari denied by Supreme Court.

Total time consumed from chargeable act to court order granting or refusing enforcement of Labor Board order: 58 months.

Celotex raised the defense that the union was aware of the marginal condition of the plant because of its knowledge of severe losses in sales, production, and work force. It argued that thus it reasonably could not be held to have wrongfully withheld information actually needed by the union. To that assertion, the trial examiner responded that "There is no doubt that the Union's negotiators were aware of the plant's declining position. But this awareness was not such that those negotiators could bargain intelligently upon the extent to which they should agree to decreases in the incomes of employees." [83] He then concluded that the union was entitled to the profit and loss figures, in order that it might "intelligently evaluate" the company's bargaining demands and "determine the extent to which they should urge the employees to make concessions." [84]

Almost five years after the *NOW*-problem of discovery arose, the wrongfully withholding employer was ordered to disclose the financial data originally demanded, but only if it elected to continue its reliance on its economic plight to insist on rewriting the overtime and job assignment provisions. It is unlikely that the union regarded that order as a "remedy."

It may be that this kind of problem is soluble only by resort to economic combat. If so, the Board ought to say so, instead of engaging in a remedial charade which can only diminish the acceptance of its expertise. Is there a viable alternative to the Board's incapacity in these circumstances? More specifically, when the problem of non-disclosure in contract negotiations arises, as it typically does during the term of a collective agreement, should it be regarded as arbitrable and subject to discovery?

Suppose that Local 711 had immediately filed a grievance in order to protest the failure of Apocrypha to produce the data which could support an independent determination of the validity of its economic

[83] 146 N.L.R.B. 48, 54 (1964).
[84] *Id.*

position. Would an arbitrator be apt to order its disclosure? Would he be warranted in doing so?

Most discovery situations arising during the term of a collective agreement relate to information needed in order to administer the collective agreement. The traditional approach is to view the grievance procedure, including arbitration, as part of collective bargaining—a continuation, in another form, of the basic process of negotiation.

That view is supported by the fact that 95 to 99 per cent of all grievances are resolved by collective bargaining prior to arbitration. When the traditional analysis is applied to the 1 to 5 per cent of grievances that ultimately are arbitrated, it is apparent that arbitration is an extension of the basic process of collective bargaining; the adversaries have created a mutually acceptable forum of last resort to resolve unnegotiable grievances. The arbitrator is selected by the parties, who instruct him carefully (albeit not very helpfully) not to "alter, amend or modify" their agreement. Thus the arbitrator functions as a kind of projection of their joint will and the arbitration as an extension of collective bargaining.

Applying that view to Apocrypha (or to *Celotex*, for that matter), is there any good reason why an arbitrator should not grant discovery? If one of the parties supports a bargaining proposition with reference to certain data and then refuses to disclose that data, is it not reasonable to compel him to disclose the data, so that its bargaining significance may be assessed? That kind of disclosure is indeed required by statute under the federal law.[85] Should it be deemed to be required by contract? During the term of a collective agreement, there is implicit in the bargaining relationship a contractual duty to disclose data which is needed to administer the agreement.[86] It is a duty which is rooted in reasonableness and relevancy. When the focus changes to the negotiation of a successor agreement during the course of a current one, the statutory duty to disclose is not affected in the least. Is there some reason why the contractual duty should be affected?

In answering that question, it is necessary to remember that an arbitrator ordering disclosure in this situation is not thereby sanctioning the proposal for which the data is sought, nor is he writing a new provision through his award. Although it is sometimes difficult to avoid, students and practitioners of collective bargaining typically agree that grievance arbitrators should refrain from creating new contractual terms, so long as there is no joint authorization to perform that function.[87] It is widely felt that the tough economic choices should be

[85] NLRA §§ 8(a)(5), 8(b)(3), 49 U.S.C. §§ 158(a)(5), 158(b)(3) (1964).
[86] *See, e.g.*, Boston Herald-Traveler Corp. v. NLRB, 223 F.2d 58 (1955).
[87] For an example of the difficulties involved in adhering to that arbitral restraint, see Hillbro Newspaper Printing Co., 48 Lab. Arb. 1166 (1967) (E. Jones, Arbitrator).

negotiated out across the bargaining table by those who have to live with the results rather than be imposed by a neutral upon a reluctant party at the insistence of its adversary.

Given all these precautions, there is no discernible reason why the union (or the employer) ought not to be able to get discovery in arbitration, even though the bargaining subject looks to the future, rather than to the past. It is still grievance arbitration. The duty is the *NOW*-duty to bargain in good faith. There is no problem about keeping the discovery situation separate from the substantive decisions of the bargainers relative to the data disclosed. But there is a great problem of timeliness for the party from whom data is wrongfully withheld. The moment when discovery is needed soon passes, and belated disclosure is discovery denied.[88]

IV

It should be clear at this point that discovery situations occur often enough to be significant problems in the administration of collective bargaining agreements. Discovery during the term of a collective agreement should be thought of as an unusual remedy responsive to acute *NOW*-problems. It may be requested infrequently, but when it is needed, it is usually vitally important to the party needing it. Thus, there are compelling reasons for permitting bargainers to have access to discovery.

The Supreme Court declared in *Acme Industrial* that

> [t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. . . . Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.[89]

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[88] The Supreme Court recognized the ephemeral characteristic of discovery in *Acme Industrial*. Of the Labor Board's disclosure jurisdiction it observed:

> [W]hen it ordered the employer to furnish the requested information to the union, the Board was not making a binding construction of the labor contract. It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. This discovery-type standard decided nothing about the merits of the union's contractual claims.

385 U.S. 432, 437 (1967).

The administrative problem is no different from that which characterizes discovery absent the prospect of a successor agreement. It must be fashioned carefully to effectuate a precisely focused disclosure, and it must be fair both in design and application.

A discovery grievance filed after termination of a collective agreement would not be arbitrable unless the parties had manifested their intent to abide by the terms of the collective agreement until the successor agreement is executed. If arbitration may be said to be available in that interim bargaining period in response to grievances arising under the "expired" agreement, then arbitral discovery would also be available as a remedy.

[89] 385 U.S. 432, 435-36 (1967).

The Court then authorized the Labor Board to enforce section 8(a)(5) rights without awaiting "an arbitrator's determination of the relevancy of the requested information . . . ." [90]

It is important, however, to recognize that the Court did not purport to tell the Board how to dispose of future disputes presenting the possibility of arbitral discovery. The Court neither required the Board "to defer to the primary determination of an arbitrator, . . ." [91] nor precluded it from utilizing arbitral discovery as an initial remedy, where that procedure would effectuate the purposes of the Act.

This concludes the first phase of this study. Discovery situations may not be common statistically but when they do occur they are aggravated bargaining situations—*NOW*-problems. This suggests the need to inquire further whether it might be possible and desirable to design appropriate arbitral procedures to cope with them. Is arbitral discovery, for example, compatible with the theory and practice of collective bargaining? Can foreseeable abuses be avoided by structuring an uncomplicated sequence of interaction among the collective bargainers, their arbitrators and the superintending (but rarely invoked) courts? Are the traditional objections to the uses of arbitral discovery in commercial arbitration appropriately invocable in the context of labor arbitration? Does the latter have the institutional competence to administer arbitral discovery? If so, what about the implications of the various legal doctrines radiating from the Federal Rules, the Taft-Hartley Act, the United States Arbitration Act and other sources of relevant national policy? To what extent may the Federal Rules be helpful in fashioning the remedy of arbitral discovery? These will be the concerns of the second of this series of three articles. In the third article we shall have a close look at the Labor Board's refusal-to-disclose cases and summarize our conclusions.

As we shall see in more detail in the third article of this series, the Board's limited resources and lack of power to enforce its own orders [92] cause delays that frustrate effective discovery. An empirical survey of NLRB disclosure cases revealed that the period from filing to disposition by the Board averaged approximately 17 months.[93] Of these cases, 44 per cent reached federal courts of appeals for enforcement of the Board's order. That added process extended the average period of time required to compel disclosure to over 29 months. In nine out of ten of the cases in which court enforcement was required, two

[90] *Id.* at 436.

[91] *Id.* at 437.

[92] Board orders are enforceable by the federal courts of appeals. NLRA § 10(e), 29 U.S.C. § 160(e) (1964).

[93] COX PANEL, *supra* note †††, at 10-11.

and one-half years had elapsed between the initial demand for discovery and final disposition. After 30 months, disclosure clearly no longer can be regarded as "discovery." In contrast, three to four months is the normal time span from demand for disclosure to a final arbitral award in the nature of discovery.[94] The importance of swift resolution of discovery problems strongly commends the use of arbitration, rather than Labor Board proceedings.

[94] *See, e.g.*, J. B. Lion Corp., 66-3 CCH LAB. ARB. AWARDS ¶ 8793 (1966) (Summers, Arbitrator); Librascope Inc., 30 Lab. Arb. 358 (1958) (E. Jones, Arbitrator).